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Managing Proprietor,

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FEBRUARY.

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The Madras Law Journal.

[PART II. FEBRUARY 1897. VOL. VII.]

THE ADVOCATE-GENERAL.

The office of Advocate-General is that of chief law officer of the Crown in the different provinces subject to the Government of India. The origin of this appointment is lost in obscurity. . All that we are now able to discover is that the Statute 21, Geo. III, ch. 70, S. 28, in providing indemnity for certain officers for acts done by them in conflict with the Supreme Court of Calcutta refers to the Advocate-General. In various Statutes of the last century relating to India reference is made to Councillors at law, who are servants of the Company, being entitled to practise their profession without subjecting themselves to any penalty for receiving or accepting fees or gratuities in the way of their profession. See 13, Geo. III, ch. 63; 24, Geo. III, ch. 25, S. 48; and 33, Geo. III, ch. 52, S. 64.

We find again in 37, Geo. III, ch. 142, S. 29, a reference to the Company's law officers providing that their opinion should be taken by the Governments in this country and submitted to the Court of Directors in the case of any complaint to the Government of any acts done contrary to the provisions of that Statute. In the charters of the Supreme Courts of Calcutta, Madras and Bombay issued respectively in the years 1774, 1800 and 1823, there is no reference to the Advocate-General, though in clause 16 of the Calcutta Letters Patent of 1774, in clause 30 of the Madras Letters Patent of 1800, and in clause 40 of the Bombay Letters Patent of 1823, there is a reference to the Attorney of the Company. We find no statutory provision relating to the appointment of Advocate-General until we come to 53, Geo. III, ch. 155, which enacts in S. 81 "that from and after the passing of this Act, it shall not be lawful for the said Court of Directors either provisionally or otherwise to nominate or appoint any person to succeed

to any office or employment in the Civil or Military establishments of the said Company in the East Indies, or parts aforesaid, without the approbation of the said Board of Commissioners * * *; provided always that nothing herein contained shall prevent or hinder the said Court of Directors from nominating or appointing absolutely or provisionally *such persons as they may think fit to the offices of Member of Council, General officer on the staff, Advocate and Attorney-General, Attorney at Law of the said Company* or Chaplain at the several Presidencies or Settlements or to any offices or employments in the Civil or Marine establishments of the said Company which may be and usually have been supplied by persons not having been Covenanted Servants of the said Company previously to their nominations or appointments * * *." Thus according to this Statute which renewed the Company's charter, the Court of Directors had the power to appoint such person as they thought fit to the office of Advocate-General. The Statute prescribed no qualifications for the office, and the Court of Directors were free, therefore, to choose any person they liked. The Company's charter was renewed in the year 1833 by the Statute 3 & 4, William IV, ch. 85. S. 2 of this Statute enacted "that all and singular the privileges, franchises, abilities, capacities, authorities, whether military or civil, rights, remedies, methods of suit, penalties, forfeitures, disabilities, *provisions, matters and things* whatsoever, granted to or continued in the said United Company by the said Act of the 53rd year of King George III, for and during the term limited by the said Act and *all other the enactments, provisions, matters and things contained in the said Act or in any other Act or Acts* whatsoever, which are limited or may be construed to be limited to continue for and during the term granted to the said Company by the said Act of the 53rd year of King George III, so far as the same, or any of them, are in force * * * and all powers of alienation and dispositions, rights, franchises and immunities which the said United Company now have shall continue and be in force and may be exercised and enjoyed as against all persons whomsoever, subject to the superintendence, direction and control hereinbefore mentioned, until the 30th day of April 1854." By virtue of this provision, the power of the Court of Directors to appoint to the office of Advocate-General such person as they thought fit was continued till the year 1854. The

"superintendence hereinbefore referred to" in the section is set out in S. 1 of that Statute as "such powers and authorities for the superintendence, direction and control over the acts, operations and concerns of the said Company as have been already made or provided by any Act or Acts of Parliament in that behalf or one made or provided by this Act." We come next to the Statute 16 & 17 Vic. ch. 95, enacted in the year 1853, S. 29 of which provides that "no appointment of the said Advocate-General of the said Company shall be valid without the approbation of the Board of Commissioners for the affairs of India." Although by the Statute 53 Geo. III, ch. 155, the power of appointment to the office of Advocate-General was vested in the Court of Directors and that power was continued by the Statute 3 and 4 William IV, ch. 85, officiating appointments to the office were made by the respective Governments of the Company in India under the authority of the Court of Directors; and these Local Governments were directed to choose a *competent* person for the office.* The appointment by the Court of Directors was rendered subject to the approbation of the Board of Control by S. 29 of the Statute 16 & 17 Vic. ch. 95. The power of making the officiating appointment which apparently rested with the Local Governments was left undisturbed. By S. 1 of that Statute it was enacted that "until Parliament shall otherwise provide, all the territories now in the possession and under the Government of the East India Company shall continue under such Government in trust for Her Majesty, her heirs and successors *with and under the powers and restrictions* and subject to the superintendence, direction and control now by law applicable to such Government and subject also to the provisions of this Act and all the provisions now in force of the said Act of the 3rd & 4th years of King William IV and *all other enactments whatsoever now in force with* relation to the said Company and Government and territories respectively *shall, save so far as the same are altered by or are repugnant to this Act, continue in force,* after the said 30th day of April 1854 as if the said term had not expired."

We come next to the year 1858, when the Government of India was transferred to the Crown. The power of appointment of Advocate-General was then in the Court of Directors subject to the

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* See note page 68.

Board of Control; and officiating appointments were being made by the Local Governments concerned. The Statute 21 and 22 Vic. ch. 106 came into force in the year 1858. S. 29 of that Act enacted that the *appointment of Advocate-General* for the several presidencies now made by the approbation of the Commissioners for the affairs of India *shall be made by Her Majesty by warrant under Her Royal Sign Manual;* * * * and such appointments shall be subject to the *qualifications now by law affecting such offices* respectively." The reference to qualifications in this section was evidently made having regard to the fact, that several other offices were also dealt with by the section as to some of which, qualifications had been prescribed by law; as, for example, that of 4th ordinary member of the council of the Governor-General of India. S. 30 of the Statute enacts that "all appointments of offices, commands and employments in India and all promotions which by law or under any regulations, usage or custom are now made by any authority in India shall continue to be made in India by the like authority and subject to the qualifications, conditions and restrictions now affecting such appointments respectively." The officiating appointment of Advocate-General was one of those which by regulation, usage or custom were being made by the Local Governments in India; and as regards the qualification, we have already seen that he must be merely a competent person. There is no later statutory provision regarding appointment to this office or the qualifications of the holder of it. But we may refer to S. 29 of the Statute 25 & 26 Vic. ch. 67, which makes mention of the Advocate-General of the Presidency or officer acting in that capacity as further indicating the distinction we have drawn between the power to make the permanent appointment and the power to appoint provisionally which appears from Ss. 29 and 30 of 21 & 22 Vic. ch. 106. This examination of the Statutes necessarily leads to the conclusion that at present the authority entitled to make the permanent appointment is Her Majesty the Queen and that the Local Government is entitled to make the provisional or acting appointment and that there are no special qualifications prescribed by law or usage, within the meaning of the 29th and 30th sections of the Statute 21 and 22 Vic. ch. 106.

The fact that advocates of the Supreme Court were selected to fill the office when the Supreme Court was in existence or that,

since their abolition, advocates of the High Court have been selected or that the persons so selected happened to be barristers of England or of Ireland proves nothing more than that a competent person was found in their ranks by the authority entrusted with the power of making the selection. It may also be not irrelevant to add that it is of some significance that while the Statutes creating the Supreme Courts of Calcutta, Madras and Bombay in the years 1773, 1799 and 1823, respectively, specified the qualifications of the judges that they should be barristers of England or Ireland and the Statute authorizing the creation of the Court of the Recorder of Madras, 37, Geo. III, ch. 142, also prescribes the qualifications of the Recorder that the Recorder should be a barrister of England or Ireland, the Statute 53, Geo. III, ch. 155, and other Statutes which relate to the appointment of Advocate-General make no reference to the qualifications of the holder of that office.

It is not improbable that in the minds of men unacquainted with the history of the appointment or the statutory provisions regarding it, an impression should arise that the name of the office involves that the holder should be an advocate. It is hardly necessary to point out that the name of an office cannot determine the qualifications which by law the holder is required to possess. We would only refer to the office of Government Pleader in this country which in the town of Madras has generally been held by a barrister who is not a pleader in the limited or technical sense of that term. Indeed the definition of the term in S. 2 of the Code of Civil Procedure is that it includes "any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader."

We have hitherto considered the question of the legality of an appointment to the office of Advocate-General of a person who is not an advocate. It may be also proper to regard the matter from another point of view as to whether the interests of Government could be properly served by a person holding the office of Advocate-General who is not himself an advocate. It cannot be disputed that the only point of view which may legitimately affect the determination of the question is whether the person selected has a right of audience in the High Court in the exercise of its several jurisdictions. Under the rules of the Madras High Court, a vakil is entitled to

appear, plead and act both on the Original and the Appellate sides of the High Court. He has also the same right to appear in the exercise of the criminal jurisdiction possessed by the High Court. As regards the Insolvent Court presided over by one of the Judges of the High Court, we have shown in our article in 6 M. L. J., p. 473, that a vakil is entitled to appear for a party in that Court under the provisions of S. 4 of Act XVIII of 1879, the Insolvent Court being subordinate to the High Court within the meaning of the words of that section. Even if a vakil were not entitled to appear as of right in any branch of the High Court, there would be nothing wrong in the Government selecting somebody duly qualified to transact the particular business which the Government may have in that Court. But we find, however, that the Advocate-General, whoever he may be, is entitled by virtue of his office to appear on behalf of Government in all matters in which the Government has any interest. Statute 53, Geo. III, ch. 155, S. 111, authorizes the Advocate-General to exhibit in the Supreme Court (now the High Court) any information or informations in the nature of an action or actions at law or of a bill or bills in equity for or in respect of any matter, cause or thing whatsoever as fully and effectually to all intents and purposes as Her Majesty's Attorney-General for the time being is by law authorized to exhibit any such information or informations in any of Her Majesty's Courts of Equity in this country." In a case reported in 4 M. I. A., 190, an attempt was made in the Supreme Court to restrict the right of the Advocate-General by confining his right to represent the Crown to matters involving pecuniary interests only. It was a case where the Advocate-General moved to interfere in the administration of a charity, and the Supreme Court having refused to hear the Advocate-General, he appealed to the Privy Council. Lord Langdale delivering the judgment of the Privy Council in *Attorney-General* v. *Brodie* at p. 200 of the Report says: "then arises the question whether the Advocate-General ought to be heard. Now it appears to us, if we are to rely upon the Statute alone, the words of the enactment are quite sufficient and the effect of them is not abridged by the statement of the particular purpose which is set forth in the preamble. There is an end of the matter." We may also draw attention to S. 417 of the Code of Civil Procedure which enacts that the persons authorized to act for Government in respect of any judicial proceeding shall be deemed

to be the recognised agents by whom appearances, acts and applications under the Code may be made or done on behalf of Government. Although Act XIII of 1895 enables the High Court to frame rules for the procedure of the Original Side of the High Court, S. 417 still applies to the Original Side, unless the High Court has framed any rule in conflict or at variance with that section. As no such rule has been framed, it follows by virtue of the provisions of S. 417, that the Advocate-General would by virtue of his office be entitled to appear in any judicial proceeding under the Code; but as already pointed out by us, S. 111 of 53 Geo. III, ch. 155, on which the widest interpretation has been placed by the Privy Council entitles the Advocate-General to appear in all branches of the High Court—a power which Act XIII of 1895, or any rules framed under it cannot touch. The above section suggests a comparison of the office of Advocate-General with that of the Attorney-General in England. The Attorney-General is now the chief law officer in England and was formerly one of the principal law officers. Barristers who were not serjeants-at-law had formerly no right of audience in the Court of Common Pleas. But the serjeants-at-law had the exclusive privilege of audience in that Court. And notwithstanding the royal warrant of 1834 abolishing the exclusive right, the Court of Common Pleas refused to be bound by it and denied audience to barristers who were not serjeants. See the case of *The Serjeants* in 6 Bingham's N. C., p. 235. But notwithstanding the stringency with which the Court of Common Pleas guarded the privileges of the serjeants the Attorney-General who happened to be not a serjeant was held entitled by virtue of his office to right of audience in that Court in a cause in which the Crown was interested, see *Paddock* v. *Forester*, 8 Dowling, 834. This decision with regard to the Attorney-General is instructive as regards the position of the Advocate-General in India. He seems to us to be similarly entitled, as representing the Crown, to audience in all Courts in the land although as a vakil or attorney he may not ordinarily be entitled to audience in particular courts. Judged therefore by the test of convenience, from the point of view of the Government that appoints, the appointment to the office of Advocate-General of a person who is not an advocate is perfectly legal and proper. We shall on a future occasion refer to other aspects of the question which point to our minds the desira-

bility of not reserving the office of Advocate-General to barristers and advocates only.

NOTE.—We have been able to procure an authenticated copy of the despatch of the Court of Directors which we reprint below.

Despatch No. 1 of 1831.

LAW DEPARTMENT.

OUR GOVENOR IN COUNCIL AT FORT ST. GEORGE.

1. The Bengal Government having submitted for our decision a question raised by the Government of Bombay as to the mode of providing for the discharge of the duties of Advocate-General in the temporary absence of that officer, we have to acquaint you that our decision is as follows, *viz.*

2. Whenever our Advocate-General or Attorney may quit the Presidency and proceed to sea, the Local Government is to appoint a competent person to act during his absence, the absentee receiving one half of the salary for a period of his absence not exceeding 18 months and the *locum tenens* receiving the other half for that period, and after its expiration the whole. In cases of absence a second time, such as that of Mr. Poe, the absentee is to receive no part of the salary, the whole of which is to be paid to the Officiating Advocate or Attorney.

We are,

your loving friends.

(Signed)	William Astill.	(Signed)	Hy. Alexander.
(„)	Robert Campbell.	(„)	J. Thornhill.
(„)	H. Lindsay.	(„)	George Lyall.
(„)	John Morris.	(„)	William Young.
(„)	G. Raikes.	(„)	C. Elton Prescott.
(„)	J. L. Lushington.	(„)	Wm. Stanley Clarke.
(„)	J. PettyMuspratt.	(„)	J. Masterman.
(„)	J. Baillie.		

LONDON,
The 23rd February 1831.

PRINCIPLES OF LIMITATION IN RELATION TO OTHER ACTS.

I propose to consider in this article the applicability of the general principles of limitation as laid down in sections 4 to 25 of Act XV of 1877, to other Acts. In other words, the point for determination is whether the general principles so laid down are of general application, or whether they are applicable only to suits falling under the second schedule of the Act. The question practically turns upon the construction to be put on section 6 which runs as follows:—

"Where by any special or local law now or hereafter in force "in British India, a period of limitation is specially prescribed for "any suit, appeal or application, nothing herein contained shall "affect or alter the period so prescribed."

In this connection it will be well to bear in mind the corresponding sections in the Acts of 1859 and 1871, for a due understanding both of the course of legislation on the subject, and of the cases decided thereunder. They are S. 3 of Act XIV of 1859 and S. 6 of Act IX of 1871, and run as follows:—

"When by any law now or hereafter in force a shorter period "of limitation than that prescribed by this Act is specially pre- "scribed for the institution of a particular suit, such shorter limita- "tion shall be applied, notwithstanding this Act."

"When by any law not mentioned in the schedule hereto "annexed and now or hereafter to be in force in any part of British "India, a period of limitation differing from that prescribed in this "Act is specially prescribed for any suit, appeal or application, "nothing herein contained shall affect such law."

Prior to 1859, there were different systems of limitation law, not only in the different Presidencies, but also in different courts in the same Presidency. There was also Regulation III of 1793. In dealing with the question at issue, I shall first confine myself to section 6, then deal with the application made of the general principles by the various High Courts; and, lastly, I shall try to deduce certain principles which, I hope, will prove of general application.

The foundation of S. 6 is the maxim '*Generalia specialibus non derogant.*' This maxim has long been recognised by the laws of

England, and finds also a place in the jurisprudence of other countries. In *Gregory's Case*, 6 Rep. 19, *Lord Coke* observes that a later statute in the affirmative shall not take away a former Act, and *es potior*, if the former be particular and the later general.' *Lord Hardwicke* in *Middleton* v. *Crofts*, 2 Atk., 650, *is* to the same effect. *Sir Orlando Bridgman* in *Lyn* v. *Wyn*, Bridgman's judgments 122—27, is of opinion that 'the law will not allow the exposi'tion to revoke or alter by construction of general words, any 'particular statute, where the words may have a proper operation 'without it.' This view is approved of by *Montague Smith, J.*, in *Conservators of the Thames* v. *Hall*, L. R., 3 C. P., 421. In *Thrope* v. *Adams*, L. R., 6 C. P., 135, *Bovill, C. J.*, observes that 'the general principle to be applied to the construction of Acts of Parliament is, that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is necessary inconsistency in the two Acts standing together.' *Kutner* v. *Phillips*, L. R., 1891, 2 Q. B., 272, lays down the same rule; and in *Abergavenny* v. *Brace*, L. R., 7 Exch, 170, *Channell, B.*, observes that a Statute prescribing rules for special subjects is not controlled by subsequent legislation of a general character. In this connection I will do well to refer to the opinion of *Mr. Maxwell*, and I cannot do better than by quoting his own words: "A general Statute "is usually presumed to have only general cases in view, and not "particular cases which have been already otherwise provided for "by the special Act. Having already given its attention to the parti"cular subject, and provided for it, the Legislature is reasonably "presumed not to intend to alter that special provision by a "subsequent general enactment, unless that intention is manifested "in explicit language, or there be something which shows that "the attention of the Legislature has been turned to the special "Act, and that the general one was intended to embrace the special "cases within the previous one, or something in the nature of the "general one making it unlikely that an exception was intended as "regards the special Act. The general Statute is read as silently "excluding from its operation the cases which have been provided "for by the special one." (Interpretation of Statutes, 3 Ed., p. 243.) To the foregoing there is an exception, which, in the words of the same learned author is as follows; "The maxim under con-

"sideration ceases to be applicable when there is in the Act or in its "history something showing that the attention of the Legislature had "been turned to the earlier special Act, and that it intended "to embrace the special cases within the general Act, or something "in the nature of either Act, to render it unlikely that any excep-"tion was intended in favour of the special Act." (Page 250.) Considering the exception first, the history of S. 6 may be briefly stated as follows: As already stated, prior to 1859, the law in force was Reg. 3 of 1793. There were also various other local laws of limitation. Reg. 3 was of general application and there was no section in it corresponding to this section. Act XIV of 1859 for the first time imported a limitation as to the scope of the Act, by providing in S. 3 that shorter periods of limitation if prescribed by other Acts were to be applied to cases arising thereunder, notwithstanding anything contained in the general Act.. Reg. 3 having been of general application, and the Act of 1859 having taken its place, it was held in cases decided under it that the general principles therein laid down were also of general application. (*Mahomed Bahadur Khan* v. *Collector of Bareilly*, 13 Beng. L. R., 292.) A change was effected by Act IX of 1871 by reason of the concluding words of S. 6 being to the effect that nothing contained in the Act shall affect other laws, and not as in the Act of 1859 whereby the special periods of limitation prescribed by other Acts were to be applied, notwithstanding anything contained in it. It was consequently held that the general principles therein laid down did not apply to special and local laws. Thus S. 5, which corresponds to the same section of the present Act was held not to apply to suits under S. 25 of the Madras Forest Act XXVIII of 1860. (*Thir Singh* v. *Venkataramier*, I. L. R., 3 M., 92). Section 6 of the present Act is worded in terms similar to those contained in S. 3 of the Act of 1859, by enacting that the periods of limitation contained in local and special laws shall remain unaffected by anything contained in the second schedule. It has consequently been held that, upon a true construction of the section, the general principles of limitation laid down in sections 5–25 apply to special and local laws. (*Kullayappa* v. *Lakshmipathi*, I. L. R., 12 M., 467–71; *Nijabutoola* v. *Wazir Ali*, I. L. R., 8 C., 910; and *Guracharya* v. *President of the Belgaum Municipality*, I. L. R., 8 B., 529.) It must not be supposed from what has been said above that the question under consideration is

free from any difficulty whatever. The recent decisions in *Viramma* v. *Abbiah*, I. L. R., 18 M., 99, and *Girija Nath Roy Bahadur* v. *Patani Bibee*, I. L. R., 17 C., 263, have introduced into the consideration of the subject principles which though not of recent origin, were nevertheless ignored in deciding the previous cases. I shall now deal with the general principles laid down in the various sections, and the cases wherein they have or have not been applied to special Acts.

The first principle which demands consideration is that embodied in S. 4. This section sounds the keynote of the whole Act, by enacting that suits instituted, appeals presented and applications made, after the period of limitation prescribed therefor shall be dismissed. There is no corresponding section in, if I am not mistaken, any other Act of the Indian Legislature, and the question is whether in cases arising thereunder, the same rule is to be observed. It may be said that whenever the Legislature fixes a period within which a particular act is to be done, no validity attaches to the act if done after the period prescribed. If this is a general principle of jurisprudence, then, why is mention made of it only in Act XV of 1877. Moreover, legislation by implication is always to be avoided, especially when it is derogatory to the rights of the subject. The point has not been decided by our High Courts in any case, statutes of limitation being statutes of repose, the object whereof is to prevent endless litigation by placing a limit thereto, it is reasonable to suppose, that the courts of law are not to take any judicial notice of endeavours made to set its machinery in motion after the period prescribed therefor. The absence of any authority to the contrary leads us also to the same conclusion. An inference to the same effect might be drawn from the case (*Reference under Forest Act*, V of 1882, I. L. R., 10 M., 210) wherein it was held that cl. 2 of S. 5 applied to appeals under the Forest Act of 1882; for the power therein conferred can only be exercised on account of the disability arising under this section.

The first clause of S. 5 is founded on the principle that no man is to be prejudiced by things beyond his control. The closure of the Court is an act of the Court itself, and one over which the suitor has no control. If, therefore, a person is unable to exercise his rights, not by virtue of any act of his own, but by reason of some act on the part of the Court, he must get the advantage of the next open day. The day on which the Court is closed must be

treated as *dies non* and left out of consideration altogether. Even in the Roman law the maxim '*Dies continui, tempus continuum*' had its exceptions; and one of these exceptions arose in cases where the Magistrate before whom the act was to be performed was inaccessible. (Goudsmits' Pandects, p. 222.) The principle underlying the section seems to be of general application in England. In *Mayer* v. *Harding*, L. R., 2 Q. B., 410; *Mellor*, *J.*, observes as follows:—"I think it cannot be considered strictly a condition precedent where it is impossible of performance in consequence of the offices of the Court being closed, and there being no one to receive the case. This does not interfere with the principle that the parties themselves cannot extend the time by their own acts." See also *Waterton* v. *Baker*, L. R., 3 Q., B., 173. The principle laid down in the above cases has been approved of and followed by the Calcutta High Court in *Shoshee Bhusan Rudro* v. *Gobind Chunder Roy*, I. L. R., 18 C., 230, wherein it was held that it applied to cases arising under S. 174 of the Bengal Tenancy Act, VIII of 1885. Apart from the existence of any general principle, it has been held in a case arising under section 77 of the Indian Registration Act, that "section 5 is of general application notwithstanding anything contained in section 6." (*Per Tottenham, J.*, in *Nijabütoola* v. *Wazir Ali*, I. L. R., 8 C., 910.) The section has been held to be applicable to cases arising under the Bengal Rent Act, VIII of 1869, and to applications under S. 233 of the Code. (*Peary Mohun Aich* v. *Anunda Charan Biswas*, I.L.R., 18 C., 631.) The case of *Thir Singh* v. *Venkataramier*, I.L.R., 3 M., 92, is no doubt against the application of the principle to special Acts, but the reason for the decision is explained in a similar case arising under the same Act (*Reference under Forest Act*, V. of 1882, I. L. R., 10 M., 210). The explanation is that the former decision was under Act IX of 1871 in which the wording of S. 6 was very different. A distinction has to be made between days on which the Court is closed and those on which the offices of the Court are not closed. The Court may be closed, but the office may nevertheless remain open. Thus in *Motiram Raghunath* v. *Bhivraj*, I. L. R., 20 B., 745, it was held that days on which the Court is closed but the offices of the Court are open, are not holidays within the meaning of section 307 of the Code. The principle embodied in this clause has by recent legislation been declared to be appli-

cable to all cases not covered by Act XV of 1877; see section 7 of the General Clauses Act, I of 1887. Notwithstanding the enactment of this section, it has been held that when the period of six months prescribed by section 195 of the Code of Criminal Procedure, expires on a day the Court is closed, the prosecution cannot be launched on the day the Court re-opens. (*Rai Chunder Mozumdar* v. *Gour Chunder Mozumdar*, I. L. R., 22 C., 176.) The reason for the decision is that penal statutes are to be construed very strictly and in favour of the party affected thereby; and that prosecutions sanctioned under the section ought not to hang fire on a man's head for a period longer than that actually prescribed. The principle under consideration has been held not to be applicable to periods of time prescribed by the Court Fees' Act. In *re Kota*, I. L. R., 9 M., 134, it was held that when the period of 89 days prescribed for an application for review of judgment expires on a day the Court is closed, the application, if made on a day the court re-opens, must be on paper bearing the full stamp. The decision proceeds on the ground that the Court Fees' Act is a fiscal enactment, and as such, is not *in pari materia* with the Limitation Act. "Enactments *in pari materia* should be read together as if they were one law, and interpreted as consistently and harmoniously as their language will fairly admit." (*Walji Karimji* v. *Jaganath Premji*, I. L. R., 2 B., 88.) It is doubtful whether a similar decision will be arrived at, notwithstanding S. 7 of the General Clauses Act above referred to.

The second clause of this section is an enabling one, empowering the Court, on proper cause being shown, to admit appeals and applications for review of judgment, after the periods of limitation prescribed therefor. It is, as it were, a sort of proviso to section 4. Founded on no principle, it has no existence outside the Statute. This clause has been held to apply to appeals presented under S. 14 of the Madras Forest Act, V of 1882, and S. 69 of the Madras Rent Recovery Act, VIII of 1865. (*Reference under Forest Act V of* 1882, I. L. R., 10 M., 210; *Rama Row* v. *Fernand*, 2 M. L. J. Rep., 217.) In the case of applications for leave to appeal to the Privy Council, this clause has been held to have no application. The reason assigned is that the clause applies only to appeals and applications for review, and that an application for leave to appeal not being an appeal, does not come within the

purview of the clause. (*In the Matter of the Petition of Sita Ram*, I. L. R., 15 A., 14; *Thurai Rajah* v. *Jainilabdeen Rowthen*, I. L. R., 18 M., 484). In the Madras case another reason is also assigned, namely, that appeals to the Privy Council are governed by special rules laid down in Chapter XLV of the Code, which rules are not subject to the general principles of the Limitation Act. This view is based on the decision in *Viramma* v. *Abbiah*, I. L. R., 18 M., 99, to which reference will be made in dealing with S. 7. It is difficult to understand the soundness of this reason. The period of six months assigned for such appeals is that prescribed by Art. 177 of the second schedule. A similar period was provided by S. 599 of the Code, but this section has been repealed by S. 57 of Act VII of 1888. The period of limitation in such cases being therefore one prescribed by Act XV of 1877, it must be subject to the other provisions of the Act; for, S. 4 enacts that the period of limitation prescribed for suits, appeals and applications, is subject to the provisions contained in sections 5 to 25. In *Rangasayi* v. *Mahalakshmamma*, I. L. R., 14 M., 391, it has been held following the Privy Council case *Burjore & Bhawani Pershad Mussumat Bhagana*, L. R., 11 I. A., 7, that the period prescribed for furnishing security under S. 602 of the Code, can be extended for good cause shown. It is difficult to reconcile the principle on which extension can be granted in one case, with the principle on which it is refused in the other.

Section 5-A covers the same field as that covered by cl. 2 of section 5.

C. V. VISVANATHA SASTRI.

NOTES OF INDIAN CASES.

Hurri Bhusan Mukerji *v.* **Upendra Lal Mukerji**, I. L. R., 24 C., 1. The rule that a suit to set aside an adoption must be brought within six years is itself one of questionable soundness. In this case an attempt was made, but without success, to narrow the period still further by the contention that, as the validity of the adoption depended upon the genuineness of a deed of permission to adopt, the period of limitation would be three years under Articles 92 and 93 of Act XV of 1877. An adoption was first made in 1884 in pursuance of the authority to adopt, but on the death of the boy, a second adoption was made in pursuance of

the same authority in 1887. The reversioners brought a suit in 1888 to have the adoption set aside. It was held by the Privy Council that the word "*issued*" in Art. 92 was intended to refer to documents to which people commonly applied that term in business, not to instruments such as a power to adopt, and that Art. 93 was also inapplicable, as there was a special Article (118) appropriate to such suits.

Satyesh Chunder Sircar *v.* **Matangini Debi,** I. L. R., 24 C., 20. An agreement to allow an annual abatement of rent is only a variation of the terms of a lease and not a fresh lease, and does not, therefore, require registration if in writing.

Bhola Pershad *v.* **Ram Lall,** I. L. R., 24 C., 34. A suit was in this case brought by a benamidar-mortgagee and the assignees of the real mortgagee were subsequently added as plaintiffs. It was held that the suit by the benamidar could not be said to have been improperly instituted and that the Court had jurisdiction to add the assignees as plaintiffs, even though their interest might have been derived subsequent to the suit. We agree with the Calcutta High Court in thinking that it cannot be laid down as a hard and fast rule that a benamidar can under no circumstances sue in his own name. Whether a benamidar can sue or not would depend upon whether he is a trustee or a mere *alias* for the real owner. Under certain circumstances he must be looked upon as a trustee. It would be a case of trust implied by law, see Ss. 81 and 82, Trusts Act. The creation of an implied trust is not subject to the formalities prescribed for the creation of express trusts.

Purushotam Das Tribhovandas *v.* **Purushotam Das Mangaldas,** I. L. R., 21 B., 23. Candy, J., decided a novel point in this case and though we are not prepared to question the learned Judge's ruling from a strictly technical point of view, we cannot help observing that he would have acted more in accordance with the sentiments of the Hindu community if he had refused any damages to the plaintiff. The short point in the case was whether the parent of a Hindu girl who promises to give his daughter in marriage has not a valid excuse for non-performance of the contract, if the daughter refuses to marry the plaintiff, where the marriage is intended to be performed after the girl attains years of discretion. The learned Judge holds that the daughter's refusal does not justify the parent, and he proceeds on the ground that the consent of the girl is not an element in the contemplation of the parties to such an agreement, and the parent having promised to give his daughter in marriage without reference to her wishes, must pay for it if he finds himself unable to do so. Assuming that an absolute promise

of this sort would make the parent liable, we are not sure that it is in accordance with Hindu ideas to hold that a parent intended to give away his girl in marriage without consulting her when she has attained the age of discretion. We do not think that actions for breach of promise of marriage should be encouraged, and it would be well to teach intending husbands to construe such promises by parents as dependent on the consent of the would-be spouse.

Shankar v. Vithial, I. L. R, 21 B., 45. It is an anomaly worth removing as soon as possible that courts of the lowest class are entrusted with insolvency jurisdiction under S. 360 of the Code of Civil Procedure and are consequently converted into courts of unlimited jurisdiction. Very often the questions arising in insolvency proceedings are more intricate than in ordinary suits, which are certainly no reason for investing all courts with insolvency jurisdiction.

Sayad Hussein Mian v. Collector of Kaira, I. L. R., 21 B., 48. In the eyes of the Calcutta and Bombay High Courts, the earlier wisdom of the Madras High Court in *Subbayya* v. *Krishna,* I. L. R., 14 M., 186, is better than its later wisdom as embodied in *Rangasami Naickan* v. *Varadappa Naickan,* I. L. R., 17 M., 462, and we cannot but think they are right and all suits to remove trustees must be instituted under S. 539, Civil Procedure Code. We need not discuss the question again as our views have already been fully expressed in a former note, See M. L. J, 49.

SUMMARY OF RECENT CASES.

Succession Certificate—Time to produce.

Boo Beebanbibi v. Rahimbhai valad Jan Mohamed.

A person suing as heir of a deceased person to recover money which had not become due or payable to the deceased in his lifetime is not required to produce a certificate under Act VII of 1889.

Where the lower appellate Court raised of its own accord an issue as to whether such certificate was necessary, and deciding it against the plaintiff dismissed the suit:

Held, that it ought not to have dismissed the suit, but should have given the plaintiff time to allow of his procuring a certificate.—*Printed Judgments of the B. H. C.*

Facts admitted by both parties—Set-off.

Govind Ramchandra Desai v. Trimbak Vishwanath Desai.

Where a fact is affirmed by one party and admitted by the other in the pleadings, the parties are not at issue on that point, and the Court is wrong in dealing with the case as if they were, disregarding the admission.

Under S. 216 of the Code of Civil Procedure as it now stands amended, a defendant is entitled to a decree for any claim arising out of the same transaction which he could have lawfully pleaded as a set-off whether under S. 111, or otherwise.

Where, therefore, in a suit by a sharer in a khoti village against the manager thereof, to recover his share in the profits, the latter claimed to be awarded the amount paid by him as assessment and expenses of *abhavani*, &c., of the plaintiff's share:

Held, that the defendant's demand could be set-off against the plaintiff's claim.

Niaz Gul Khan v. *Durga Prasad*, I. L. R., 15 A., 9, referred to.—*Printed Judgments of the B. H. C.*

Adoption by widow—Motives to, discussion of, irrelevant.

Ramachandra Bhagwan v. Mulji Nanabhai.

In this Presidency in the case of a widow having the power to adopt and a religious benefit being caused to her deceased husband by the adoption, any discussion of the adopting widow's motives in making the adoption is irrelevant.—*Printed Judgments of the B. H. C.*

Sanagappa bin Amingowda v. Shivbasawa kom Amingowda.

Though the High Court, sitting in second appeal is not entitled to consider whether, upon the evidence before it, the lower appellate Court was correct or not upon a question of fact, yet there is no doubt that it would be acting within its jurisdiction in holding (if the fact were so) that the lower appellate Court had made a new case for the parties not warranted by the pleadings and evidence and in reversing its decree upon that ground, or that it would be within its powers in reversing the decree of an appellate Court if, without any evidence to support its finding, it reversed the decree of the Court of first instance. The former would be an error of procedure on the part of the lower appellate Court, and the latter an error of either procedure or law.—*Printed Judgments of the B. H. C.*

Defamation—Libel.

Lord William Nevill *v.* **The Fine Art & General Insurance Company, Limited** [1897, Appeal Cases, 68.]

In order to constitute a document a libel, it is not enough to say that by some person or another the words *might* be understood in a defamatory sense. But it should be such that it could be reasonably taken in a defamatory sense by those to whom it was published, according to the primary meaning of the language used in it.

The plaintiff acted as the defendant's agent and was carrying on the business of the agency at his own offices, 27, Charles' Street, St. James, After some time the plaintiff's agreement fell through, and the Secretary of the defendant's company sent a circular to certain persons who transacted insurance business with them through the plaintiff's office, which circular contained the following words: "The agency of Lord William Nevill at 27 Charles' Street, St. James' Square, has been closed by the Directors." The House of Lords held, confirming the decision of the Court of Appeal, that these words were not defamatory.

Maritime lien—Damages.

Currie *v.* **M. Knight** [1897, Appeal Cases, 97.]

It is one of the established doctrines of British Maritime Law that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. But it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre will no doubt be always due to the want of skill or negligence of the persons navigating the vessel; but it is attributable to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage.

There were three vessels moored alongside of an open quay. One of them, *the Dunlossit*, was in the centre of the tier, the steamship *Easdale* being outside her and moored to the quay by cables passing over the deck of the *Dunlossit.* A heavy gale began to rage which made the position of the vessels insecure. The *Dunlossit* was in serious peril of damage from contact with the vessels between which she lay, and her master being anxious to put to sea, and being unable to induce the master of the

Easdale to let go his moorings, cut them and sent her adrift, with the result that she went ashore and was damaged. The owner of the *Easdale* obtained a decree for damages against the owner of the *Dunlossit*. The *Dunlossit* was arrested in execution of this decree and was sold at the instance of a mortgagee of hers. A competition then arose between the owner of the *Easdale* and this mortgagee as to priority in the distribution of the sale-proceeds:

Held, by the House of Lords that there was no maritime lien created in the case and that the mortgagee had the prior claim to the price.

Nuisance—Street obstruction—Town Council.

Ogston v. Aberdeen District Tramways Company [1897, Appeal Cases, 111.]

A Tramway Company after a heavy snowstorm cleaned their track by means of a snow plough, and thereby increased the deposit of snow in certain portions of the street, and, in order to prevent the snow or snow water from freezing in the grooves, they scattered salt upon the rails and in their vicinity. The snow and salt in combination formed a wet briny amalgam, and the slush thus formed was left to remain in the street without being removed then and there. The result was that the briny slush permeated a large portion of the street and caused good deal of injury to horses standing or moving there:

Held by the House of Lords, that these acts of the Tramway Company amounted to an unauthorized nuisance, and that they were responsible for it, notwithstanding the fact that the duty of removing any obstructions in the street rested with the Town Council as the street authority.

Per. Lord Watson—"The nuisance is ultimately and mainly due to the employment of salt, which is used by them and not by the Town Council. If they chose to employ means which, if certain precautions are not observed, will lead to a nuisance, they must first insure that these precautions will be taken. The Town Council are under no obligation, statutory or otherwise, to counteract the illegal proceedings of the respondents."

Stream—Water percolating underground.

McNab v. Robertson, and others [1897, Appeal Cases, 129.]

The word "stream" in its natural and primary sense denotes a body of water having, as such body, a defined and continuous flow in one direc-

tion, whether this be underneath the ground or on the surface of the earth. But water, whether falling from the sky or escaping from a spring which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through these strata, until it issues therefrom at a lower level through dislocation of the strata or otherwise, cannot be described as a "stream."

A lessor demised by lease a distillery, cottages and thirteen-and-a-half acres of land, with two ponds within the demised area together with the right to the water in the said ponds and in the streams leading thereto. There was a spring which rose at a distance from the demised area and which on its way towards one of the ponds lost itself in a marsh just outside the demised subjects and percolated through the marshy ground into one of the ponds. The lessor sunk a tank in the marsh, drew off thence the percolating water which would otherwise have found its way eventually into the pond:

Held, by the House of Lords (Lord Halsbury, L. C., dissenting) that the water thus drawn off by the lessor was not water in any stream leading to the pond. The Lord Chancellor, however, held that the word "streams" in the lease included as between the lessor and the lessee all the sources of supply of the ponds. He said: "So far as one can get any light from the nature of the thing, the subject-matter with which the parties were dealing, it appears that what the grantor intended to convey to the grantee, and what the grantee, who was a distiller, was getting, was every source of supply which it was possible to get by general words."

In answer to the contention that the lessor was under an implied contractual obligation to allow as much of the water of the unlet sources from which the pond was fed to continue to enter it so as not to diminish the average supply which the ponds were receiving at the date of the lease, Lord Watson said: "But any such implication is attended with difficulty in cases like the present, where certain sources of supply are specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications :—

The Educational Review for February 1897 (*in exchange*).
Green Bag for February 1897 (*in exchange*).
Allahabad Weekly Notes for February 1897 (*in exchange*).
The Canadian Law Times for February 1897 (*in exchange*).
The Albany Law Journal for February 1897 (*in exchange*).
Harvard Law Review for February 1897 (*in exchange*).

The Ambassador's Parrot.—We gather from the "Law Notes," London, the material facts of a serious international crisis. A parrot escaped from the Japanese Embassy in Berlin and alighted in a tree in an adjacent garden. To dislodge the parrot the attachés of the Embassy used a garden hose from the wall of the Japanese dominions and incidentally drenched Herr Fleckinhaus, the owner of the garden, who was under the tree. The parrot did not come off the perch, but in a mournful voice kept saying, "Regenwetter, immer regenwetter." On Herr Fleckinhaus, however, the wet blanket did not have an effect so subduing. "Mad as a wet hen" he rushed to action; and it was an action for trespass brought in the Schöppengericht. An attempt was made to defeat German jurisdiction on account of the extraterritorial character of the embassy, but this failed, and the invasion of Germany by water was punished by judgment for damages.—*Case and Comment.*

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Dissatisfied with the Pony.—The opinion of Judge Wilkes in a late Tennesse case describes a tragedy and its consequences ;—It was a suit on a note for a Texas pony described as "a small pony mare, well formed, with bright eyes and a remarkably active pair of heels." It appeared that on making the trade, defendant was in the act of leading the pony away with an ordinary halter "when the plaintiff suggested that a 'slip halter' would suit the temperament and disposition of the animal better," and advised defendant "not to turn her loose or put her into a stable, but to tie her to a post until she was gentle." Strictly following directions, defendant next morning "came around to see if the pony was making any progress toward getting gentle and found her very quiet,—in fact she was dead. He says that he does not certainly know what caused her death, but thinks it was because 'she could not get her breath.' This seems quiet probable, as the 'slip halter' was found to have 'slipped' down and become tightened around her nostrils." The defendant claimed that "he only took the pony on

'probation' for six months and by the contract had the right, at any time he was dissatisfied, to rescind the trade and deliver up the pony," and that while he did not offer to return the pony because he was prevented "by the act of God," "that when he saw that the pony had committed suicide he did not care to keep her any longer, and he therefore exercised his option to rescind the trade." Plaintiff insisted that it was the "act of the pony" which prevented the return, but the defence was held good, and the Court said :- "We think the weight of the proof was that the defendant was to have the right to rescind the trade at any time within six months, if he became displeased with his bargain, and, having exercised his option, we cannot say that he acted arbitrarily in becoming displeased after the pony had put an end to her further usefulness by means of the device furnished by the plaintiff."—*Case and Comment.*

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We take the liberty of reprinting the following article from the Law Magazine and Review :—

The right of counsel to be instructed by lay clients.

At this epoch of history, the close of the Nineteenth Century, by means of a very determined influence exercised by the seniors of the Bar, the average junior barrister has been taught to believe and now as a rule holds it as part of his creed, that he may not be instructed as counsel for a lay client without the intervention of an intermediary—solicitor or attorney. It is obvious that to a senior barrister doing a large practice, it is most beneficent to observe in all its fulness the so-called obligation of having another man—call him attorney, solicitor, procurator, agent, scrivener or whatever else you like—who will do the inferior work, that is to say, the work of taking the instructions of the lay client for him, separating the wheat from the chaff, and finally bringing the case, bereft of all unnecessary appendages, to him, the barrister, for the benefit of his learned opinion, or for fight in the Forum. All this, be it remembered, being to the disadvantage of the junior barrister, who might obtain several of the lesser cases, now brought to his more fortunate brother, were that brother more hampered by doing all the inferior work of cases himself, instead of having another man—the intermediary—to do that work for him.

In the middle part of this century, however, the abovementioned superstition, of the necessity of the employment of an intermediary, met with a well deserved check at the hands of the Court of Queen's Bench, presided over by Lord Campbell, the Chief Justice.

The facts were these. Mr. Justice Patteson, at the Spring Assizes, 1846, for the County of Gloucester, tried a cause of ejectment in which the defendant appeared and pleaded in person; the case being *Doe d. Bennett* v. *Hale.* Mr. A. Newton, a barrister, appeared as counsel for the defendant, cross-examined the witnesses, and was about to address the jury on behalf of the defendant when the learned Judge inquired of him whether he was instructed by any attorney. Mr. Newton answered in the negative. The Judge thereupon refused to permit him to address the jury, stating that he should confine him to arguing any point of law which might arise. Fortunately for the history of the Bar, although unfortunately for the then defendant, the jury found a verdict for the plaintiff. In Easter Term, 1850, a Rule *Nisi* had been obtained for a new trial of this cause on the ground that the defendant ought to have been allowed to address the jury by his counsel. Mr. Keating shewed cause against the Rule, arguing that the rule of Common Law was the same in civil as in criminal proceedings, *i.e.*, that a party could only appear in person, that this rule was first altered by the statute of Westminster II, (13 Edw. I., c. 10) which allowed parties to make general attorneys; but after that time the analogy between civil and criminal proceedings ceased, for a prisoner could not be defended by counsel. The party must have advocated his own cause to the jury, the counsel only assisted in arguing points of law. He also referred to 2 Hen. VII., c. 19, authorizing plaintiffs to sue *in formâ pauperis*, which does not allow of a party calling upon a counsel to act except through the intervention of an attorney, for it expressly gives the pauper the services of an attorney as well as of counsel gratuitously. He also referred to the then County Courts Act (9 & 10 Vict., c. 95), by sect. 91 of which it was provided that a barrister in a County Court must be instructed by an attorney. He admitted, however, that in criminal trials a prisoner had always been allowed to have himself defended by counsel, without the intervention of an attorney.

Mr. A. Newton, in support of the Rule, argued that the practice in criminal matters was conclusive, for the only question was whether there be any rule of law prohibiting a counsel from appearing without an attorney. A counsel might appear without a fee, for that was a matter entirely for his own consideration. It is not optional with a counsel to receive a brief, or not, if offered. The etiquette of the Bar alone could be relied on to prevent fees, less than those sanctioned by usage, being taken. In Equity Courts it is understood that the practice exists of taking briefs without the intervention of a solicitor, why then should not the same liberty prevail at Law? In the House of Lords it

is the practice to allow persons who are not attorneys to conduct the business, there being an express Order that the parties be heard by themselves, their counsel, attorneys, or *agents*. In the Privy Council the practice is to allow others to conduct appeals besides the party or his proctor.

Judgment was delivered by Lord Campbell, Chief Justice, on behalf of the Court. The names of the Judges who sat during the Easter Term were, besides the Chief Justice, Mr. Justice Patteson, Mr. Justice Wightman, and Mr. Justice Erle. They were probably all present. The judgment was as follows;—

"In this case we are called upon to consider whether in the Superior Courts there be a rule of law which prevents a defendant in a Civil suit, who has appeared to the process in person, from having in the stages of the suit in which counsel, if regularly instructed by an attorney, might assist him, the assistance of counsel instructed by himself without an attorney. There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a Civil suit except from an attorney; and I believe that it is for the benefit of the suitors and for the satisfactory administration of justice that this understanding should be generally acted upon; but we are of opinion that there is no rule of law by which it can be enforced. The only statutable provision upon the subject is by the late County Courts Act (9 & 10 Vict., c. 95, s. 91), which enacts that a barrister shall not be entitled to appear in any of the said Courts unless he be instructed by an attorney. The statute of Westminster I., allowing an appearance by attorney, the statute 7 Will. III., c. 3, allowing in cases of treason a full defence by two counsel, and the statute 6 & 7 Will. IV., c. 114, allowing a full defence by counsel in all cases of felony, are silent as to the manner in which counsel are to be instructed. This being a matter of procedure, the Judges, of their own authority, might, according to their view of what was fit, have laid down a general rule determining under what conditions and restrictions barristers should be permitted to plead and have pre-audience before them, but no such Rule is to be found. The alleged restriction, therefore, must depend upon usage, from which it might be inferred that such a rule had been promulgated, although not now extant in writing. In Criminal Courts, it is conceded that the practice for a barrister not to plead unless instructed by an attorney, does not prevail, and we all know instances in which, with the sanction and at the suggestion of Judges, barristers have defended prisoners without the intervention of an attorney.

"There would be a great difficulty in drawing a strict distinction for this purpose between Civil and Criminal proceedings, and between Civil and Criminal Courts. The obligation upon the owner of land to repair a highway may be tried upon an indictment; and a man may be charged with an offence in the shape of an action to recover a penalty. On the Circuit, we familiarly talk of the Crown side and of the Civil side; but questions respecting insolvent debtors used to be discussed and determined in the Crown Court, and at Nisi Prius there are tried not only cases of *mandamus* and *quo warranto*, but criminal informations and indictments for mis-

demeanours. Even an indictment for the crime of murder may be removed into this Court by *certiorari*, and tried at Nisi Prius.

"In strictly Civil suits the usage has not been invariably uniform, as we must presume it would have been, had it been regulated by a law which as propounded admits of no exceptions. Instances have been mentioned to us in which counsel of great eminence and high honour have thought that from peculiar circumstances they were justified, with or without a fee, in holding a brief delivered to them by the party without any attorney being employed. There is no decided case which can assist us, for in *The King* v. *Sir Francis Burdett*, and *Moscati* v. *Lawson* (7 Car. & P. 32), the question was not respecting the intervention of an attorney, but whether if a party conducts the trial himself as his own counsel, he may likewise have the assistance of counsel to argue questions of law, and to examine witnesses. If immemorial usage be relied upon, we must remember that sergeants-countors and other counsel existed in England long before the time of Edward I., and there seems every reason to believe that they communicated directly with the parties. Chaucer speaks of—

"'A serjeant-at-law wary and wise
That oft had been at the Parvise.'

"The Parvise is well known to have been a sort of exchange at St. Paul's, where all ranks met to do business, and the serjeants-at-law, like Roman patrons, gave advice to all that came to consult them. Afterwards, each serjeant-at-law had a pillar in the Cathedral assigned to him, where he stood and communicated with his clients. The advantage to be derived from sub-dividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process, and did what was necessary in the offices of the Court for bringing the cause to trial and for having execution on the judgment. I highly approve of the demarcation finally drawn between the functions of the attorney and those of the counsel, and I believe that the intervention of the attorney between the counsel and the party has greatly contributed, not only to the dignity of the Bar, but to the improvement of English jurisprudence. I revert to the practice of former ages only for the purpose of shewing that the onus here does not lie upon the defendant to vouch an Act of Parliament, or rule of Court, or decision to support the privilege which he claims.

"I am by no means insensible of the inconvenience which may arise from this privilege being judicially recognized. But I do earnestly trust it will not alter the almost uniform usage which has prevailed upon the subject for more than a century, and that the interference of the Judges to rectify any abuse of it will not be necessary. Exceptional cases may again occur, though very rarely, when it may be fit for barristers to plead in Civil suits instructed only by the parties, but they may continue generally to adhere to what has been considered the etiquette of the Bar, for although ever ready to render their best assistance for the discovery of truth and the vindication of right, they are at liberty, under the control of the Courts, to lay down conditions upon which, for the public good, their services are to be obtained.

"Nor can that highly honourable and useful branch of the profession, the attorneys, be prejudiced by this decision, for it would be penal for any class of men to

perform any of the functions which properly belong to an attorney; and their intermediary agency between the parties and the counsel, so conducive to the due administration of justice, will, I hope, remain unimpaired. At any rate, we can at present only look to see how the law is, leaving any inconvenience which may be produced by it to be remedied by the authority of the Judges or of the legislature.

"Upon the whole, we are of opinion that the Rule for a new trial ought to be made absolute."

The Rule therefore was made absolute.* It should also be mentioned that, in the course of the arguments, Mr. Justice Erle explained that "counsel" formerly meant a friend retained to conduct the suit, adding that "perhaps he only escaped the penalties of maintenance by being paid for his services."

It is interesting to notice that sect. 91 of the County Courts Act, mentioned in the above judgment, which prohibited a barrister from appearing in a County Court unless instructed by an attorney, was repealed by sect. 10 of 15 & 16 Vict. at the instance of the late Lord Brougham, and it is thereby enacted that "a barrister *retained by* or on behalf of *the party* on either side" may address the Court, subject to such regulations as the Judge may from time to time prescribe for the orderly transaction of the business of the Court. And this Rule has been continued in County Court Acts to the present day.

Mr. Serjeant Manning has written the following note on the above case of *Doe d Bennett* v. *Hale* :—

"Before the statute of Westminster II. (1 stat. 13 E. 1), c. 10 plaintiffs and defendants were bound to appear in person unless authorized, by the King's writ of *dedimus potestatem de attornato faciendo*, to substitute an attorney. Once before the Court they were at liberty to avail themselves of the assistance of a countor (pleader) who might stand by them, advise with them, and speak for them. In the King's Court of Common Law, though it was otherwise in the Ecclesiastical Courts, the countor could only be a person of a particular class, selected by the Crown *ad serviendum ad legem*, in administering justice as judges of the Courts of King's Bench and Common Pleas, and as justices of assize: or, when not so employed by the Crown, in assisting those suitors who were too ignorant of the law or too little acquainted with the (*French*) language in which the proceedings were carried on, to conduct their own cases.

"But, when a general power to appear by attorney, had in 1285, been given by stat. Westminster II. (1 stat. 13 E. 1), c. 10, and all persons were at liberty to appoint either *general* attorneys or attorneys *ad lucrandum vel perdendum* in a particular cause, it was thought expedient to restrict the appointment to persons presumed to be acquainted with the common law. The course of preparation for the degree of the coif was:—first, to pass sometime in an inn of chancery, then to enter at an inn

* 15 Q.B. (Adolp. & Ell., New Series) 171; *s.c.* 19 L.J. (Q.B.) 353.

of court, and then to proceed through the degrees of inner barrister and outer barrister to that of apprentice at law, from which latter class the serjeants were chosen.

"The serjeants were bound to attend the sittings of the *Magnus Bancus* (the Court of Common Pleas); and, as that Court had become stationary, whilst the Chancery, the King's Bench and the Exchequer still followed the person of the King, it was considered desirable that these Courts should have the assistance of advocates who had not yet been called upon to take the degree of the coif. A measure was resorted to for providing for both these wants. An order was made in Parliament in 1292 (1 *Rot Parl.* 84 *b.*), entituled '*de attornatis et apprenticiis,*' by which the justices of the Common Pleas were required to appoint a certain number *de quolibet comitatu, de melioribus et legalioribus et libentiùs addiscentibus,* to attend the Courts, great complaints having been made in Parliament of causes being lost for want of serjeants (*par defaute de serjeantie*); 1 Rot. Parl. 4 a; 2 Rot. Parl. 140 a, b; *Mann. Serviens ad Legem,* 268. From this period, apprentices at law enjoyed the double privilege of appearing as attorneys for suitors in all the common law Courts, and of acting as advocates in those Courts in which serjeants did not regularly attend. Thus, in the 11 Ed. III. (2 Rot. Parl. 96 b; *Mann. Serv. ad Legem,* 188), *John de Codyngton,* an apprentice and attorney, was discharged by the council from a command of the Lord Admiral to appear at *Orewell* armed and apparelled as a man at arms. Afterwards persons were admitted to practise as attorneys who had not taken the degree of apprentice at law; and utter barristers were allowed to appear as advocates in the itinerant Courts without qualifying themselves to act as attorneys, within the Order of 1292, by taking the degree of apprentice. Of late years students (inner barristers), being certified special pleaders, have been allowed to act as advocates at the Judge's chambers.

"At common law, the serjeant could seldom receive his instructions through an attorney; and, after the making of the Order of 1292, although in the Common Pleas a serjeant might be instructed by an attorney, yet in other Courts the apprentice attorney would have no one to instruct but himself, until the separation of the two functions, which now generally prevails, had taken place; a separation which does, however, exist in the proceedings of many Inferior Courts, and which has been discontinued in the case of the Crown, the King's Attorney-General no longer instructing and assisting the King's serjeants, but conducting the King's business himself."

Sir Patrick Co'quhoun, writing about the same date (1854) as the above judgment of Lord Campbell, says ("Roman Civil Law," Vol. iii., p. 317):—"One of the *advocati* who were accustomed to frequent the Forum in more recent times, was usually requested to demand the action for the actor; but it is probable that at an earlier period the client first applied to his patron, in order to obtain his opinion on the case, and to secure his services in the suit, which would in England be called 'retaining counsel.' It was, however, the custom in Rome, for the patrons to pace up and down the Forum during the period at which the Court

sat, which was four o'clock by the Roman, equivalent to about nine o'clock of our computation:—

> "Ventum erat ad Vestæ *quarta* jam *parte diei,*
> Præterita; et casu tunc respondere vadato
> Debebat, quod ni fecisset perdere litem,*

in order to be consulted by their clients, and such others as required their aid and advice.

"In like manner, the serjeants used to assemble in St. Paul's to be consulted by their clients in the City of London; and even at the present time a pillar in the Cathedral is assigned to a serjeant on his creation; for the very convenient practice of retaining counsel through the intervention of attorneys *is of a comparatively modern date*—perhaps of not more than one hundred years back—since formerly no one was allowed to employ an attorney or agent who could appear in person, and then only by leave of the Court; a trace of this practice is observable in the 'calling the plaintiff,' in cases of nonsuit. . . . . Although the intervention of an agent is in a great number of cases unnecessary, it is judged inconvenient to depart from the general rule in particular instances; hence the etiquette of the superior branch of the legal profession admits but three exceptions; when the client wishes to consult counsel upon the conduct of his attorney, because it is not judged advisable that another attorney should intervene in so delicate an affair; in the case of the drawing up of wills, because the client may wish to confide his future intentions to as few persons as possible; and in the case of the defence of persons under indictment for criminal offences because, being for the most part indigent persons, it is not considered just to expose them to the additional expense of employing an attorney. The same reasons are probably applicable to cases in the Inferior Court, but this has as yet hardly become a settled practice."

The reader will notice that at the time when the abovementioned judgment was delivered, and when Sir Patrick Colquhoun wrote, the intervention of an attorney or agent was by no means fully recognized; the practice of this intervention had been struggling for an existence for about a hundred years before that time, and was looked upon rather as a *convenience* than as an *obligation.* Sir Patrick Colquhoun, whilst adopting the extreme view of the desirability of the intervention, is nevertheless forced to admit that there are three important cases in which such intervention cannot be tolerated; and he further admits

* Hor. *Sat.* I., 9, Verse 35.

that the practice of intervention is comparatively speaking new, and unsupported by any legal enactment.

Mr. Serjeant Pulling ("Order of the Coif," p. 2) says: "The Brothers of the Coif (serjeants) devoted to the profession of the law, bound by a solemn oath to give counsel and legal aid to the King's people, were for ages to be found at their ancient rendezvous in St. Paul's Cathedral, the *Parvis*, or their allotted pillar there, wearing their distinctive costume, the robe and the coif, ever ready to receive those who sought their assistance, to give counsel *pur son donant* to the rich, and gratis to the poor suitor, and to aid when called on in the judicial business of the King's courts." And again (p. 160), "the Round of the Temple Church like the *Parvis* of St. Paul's was for ages professionally resorted to and used both by students and practitioners of the law." These legal meetings are referred to by Ben Jonson in the "Alchemist," and by Samuel Butler in "Hudibras," part 3, c. 3. Other instances could doubtless be found with a little research,

And such is the law at the present day. Barristers, *i. e.*, apprentices of the law, have succeeded to the privileges of the serjeants, but the powers of the Bar have not been restrained by any statute. They are the same now as they ever were. And although it may be urged that it is convenient for the rich suitor to have the use of the intermediary, to act as his agent, and for counsel in large practice to have the intermediary to perform the less dignified work for them, so as to render their own work shorter with regard to each case, and thereby to enable them to accept a larger number of cases and a proportionately larger number of fees, yet it should not be forgotten that many suitors are very poor, and that it is a matter of no little moment to them to be able to carry on a lawsuit, a prosecution, or a defence, without the expense of an intermediary. This the law allows them to do; this the law permits barristers to undertake. Without disparaging the utility of attorneys, or solicitors, and their bills of costs, it nevertheless is desirable that the superstition of the necessity of employing an intermediary should be removed, and that the Bar—especially the junior Bar—should be fully cognizant of their rights. The fusion of the duties of barrister, attorney, solicitor, and notary public in one person, in many of our colonies and in the United States, testifies largely to the opinion of those of our own kith and kin as to the undesirability of the employment of intermediaries. What would be said if a medical man could alone be approached by his patient through a chemist and druggist? or a clergyman through the parish clerk?

JUNIUS.